

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 23, 2008

KENNETH CARRUTHERS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2004-D-2603 Cheryl Blackburn, Judge

No. M2007-00929-CCA-R3-PC - Filed February 22, 2008

The Petitioner, Kenneth Carruthers, appeals from the Davidson County Criminal Court's order dismissing his petition for post-conviction relief. He argues that the dismissal was erroneous because, prior to pleading guilty to one count of second degree murder, he did not receive the effective assistance of counsel guaranteed him by the United States and Tennessee constitutions, and therefore, his plea was entered involuntarily. Following our review of the record and the parties' briefs, we conclude that the Petitioner has not demonstrated that trial counsel was constitutionally ineffective or that his plea was involuntary. Consequently, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Kenneth Carruthers.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Jeff Burks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

In October of 2004, a grand jury returned a four-count indictment against the Petitioner, charging him with first degree murder, attempted first degree murder, driving without a license, and evading arrest. Pursuant to a plea agreement, the Petitioner pled guilty on August 15, 2005 to one count of second degree murder, and the three remaining charges were dismissed. In accordance with the plea agreement, the trial court sentenced him to serve nineteen years in the Department of Correction as a violent offender.

Following an exchange between the trial court and the Petitioner at his guilty plea submission hearing regarding the Petitioner's rights and his understanding of the nature and consequences of entering a guilty plea to second degree murder, the State set out the factual circumstances underlying his crime. According to the State, had the Petitioner's case gone to trial, two witnesses were prepared to testify that on May 24, 2004, they picked up the Petitioner (who was armed with a gun) and his co-defendant in a van and drove them to a residence on Eleventh Avenue South in Davidson County. The Petitioner and his co-defendant ran around to the back of the house where a group of men were gathered. Gunshots were fired, and some of the men behind the house, who could positively identify the Petitioner because they knew him, were prepared to testify that he had run around the house and was armed with a gun. One of the men testified at a preliminary hearing that the Petitioner shot and killed Marcus McAdams before running back to the van in which he had arrived; this witness would have provided the same testimony at trial. Scientific evidence would demonstrate that the victim was shot with a forty-five caliber weapon and died from the gunshot wounds. The Petitioner and his co-defendant were later arrested, and his co-defendant gave a statement to detectives admitting his presence at the scene of the shooting. The Petitioner did not give any statement to authorities.

At the close of the Petitioner's guilty plea submission hearing, the trial court accepted his guilty plea and sentenced him. The Petitioner filed a timely pro se petition for post-conviction relief, alleging that trial counsel was ineffective and his guilty plea was involuntary. Post-conviction counsel was appointed, and an amended petition was filed. Subsequently, the post-conviction court held an evidentiary hearing at which the Petitioner, his mother, and trial counsel testified.

At the post-conviction evidentiary hearing, the Petitioner testified that prior to his arraignment, an assistant public defender was appointed to represent him on the indicted charges but that later his family hired trial counsel to represent him. According to the Petitioner, he first met trial counsel in February or March of 2005, but he did not receive any discovery documents from him until approximately two weeks prior to his August 15, 2005 trial date. During that period, trial counsel hired an investigator who twice met with the Petitioner in jail; the Petitioner did not meet with trial counsel in jail. The Petitioner appeared in court "four or five times" prior to his trial date, but he did not see trial counsel on any of those occasions; rather, the investigator would meet with him at the courthouse. On one occasion, he did speak with trial counsel on the investigator's cellular telephone. However, the Petitioner asserted that they never discussed the facts of his case.

When the Petitioner arrived in court on August 15, 2005, he thought he was going to trial, so he was dressed in street clothes rather than a prisoner's uniform. Regarding his thoughts about going to trial on that day, he said, "I was ready to go. [There] just wasn't [anything] prepared, though." On that day, he and trial counsel primarily discussed plea agreements offered by the State. Trial counsel also told him about the State's case, including the testimony the State's witnesses were prepared to present. However, the Petitioner testified that trial counsel did not know the facts of his case, did not propose any type of defense strategy to him, and was not prepared to go to trial. The Petitioner conceded that it was possible that trial counsel was prepared for trial and he just did not know it.

The Petitioner further testified trial counsel advised him to take the State's nineteen-year plea offer, rather than go to trial and risk being sentenced to a life term. After hearing this advice, the Petitioner said that he was "confused." The Petitioner also testified that trial counsel told him that the jury pool on that day was not favorable because they were all "rednecks." His mother encouraged him to take the nineteen-year plea agreement because she would die before he finished serving a life term.

Asked why he did not request a continuance because trial counsel was not prepared and he did not want to accept the State's plea offer, he said, "Because it was like it was still going to come out the same way either way it goes, so might as well go on and get it over with."

The Petitioner stated that once he agreed to accept the State's offer, trial counsel instructed him to answer questions during the plea colloquy with simply "yes" or "no." He agreed that during the colloquy, he told the trial court that he had no complaints about his legal representation, but he maintained that he did not voluntarily enter his plea. According to the Petitioner, the only reason he pled guilty was because he did not think he would be able to secure the services of another attorney.

On cross-examination, the Petitioner confirmed that he had pled guilty to previous offenses prior to entering his guilty plea to second degree murder and knew that he was entitled to a trial. He also acknowledged that there had been a "full preliminary hearing" regarding his homicide charges in the instant case during which the State's witnesses testified and were cross-examined. As such, he agreed that he was apprised of the nature of the State's proof against him.

When asked what motions trial counsel should have filed and what defense strategies were possible, the Petitioner responded that trial counsel would have been able to discredit the State's witnesses had they discussed their credibility because the two people who picked he and his co-defendant up in the van were drug dealers and another witness was not actually present at the scene of the murder. He asserted that trial counsel never discussed any witnesses he might call on his behalf or the fact that he could subpoena witnesses. If they had discussed subpoenaing witnesses, the Petitioner would have subpoenaed "Rico Steel" and could have told trial counsel about fifteen to twenty people who were at the scene of the shooting and armed with guns.

Also on cross-examination, the Petitioner confirmed that, during his guilty plea, he represented to the trial court that he believed his lawyers had done everything they could for him. The Petitioner additionally stated that he was in fact on medication (Haldol) the day he entered his plea, despite the fact that he told the trial court that day he was not on medication. On re-direct examination, he explained that prior to being implicated in the instant murder, he was the victim of attempted murder when someone beat him with a pistol and shot him in the face. He had facial reconstructive surgery as a result of the incident, and he developed psychiatric "problems." According to the Petitioner, he was prescribed Haldol because he was suicidal. He had the opportunity to tell trial counsel about this medication, but he did not.

The Petitioner's mother, Sally Carruthers, testified that she hired trial counsel. On the day the Petitioner was scheduled to go to trial, trial counsel informed her that the Petitioner's co-defendant had accepted a plea agreement and would testify against the Petitioner if he did not plead guilty. Because trial counsel told her the Petitioner would receive a life sentence and not be eligible for parole for fifty-one years if he went to trial, she convinced the Petitioner to take the nineteen-year plea offer. However, according to Ms. Carruthers, the only reason the Petitioner admitted to being "the shooter" at the plea submission was because trial counsel "said that's what [the Petitioner] needed to come out and state."

Trial counsel testified that he had been practicing law in Tennessee for ten years with an emphasis on criminal defense for approximately eight and one-half years. Regarding discovery, trial counsel stated that he received discovery from the State and that he thought an investigator took it to the Petitioner in jail and discussed it with him. Trial counsel met with the Petitioner once "shortly" before the scheduled trial date, and then again on the trial date when he "went over some other things that [the Petitioner] had questions about."

Trial counsel affirmed that he had spent sufficient time with the Petitioner to "go over" the facts of his case, the evidence against him, and any defenses he might put forth. He also confirmed that he had fully discussed the ramifications of going to trial on a charge of first degree murder, the potential sentences for that crime, and those for the lesser-included offenses. According to trial counsel, the Petitioner understood his options, including the right to go to trial. Trial counsel asserted that he "was ready to go to trial if [the Petitioner] was willing to go to trial."

Trial counsel was prepared to mount a defense centered on the theory that the Petitioner was not present at the scene of the shooting. Regarding whether the Petitioner informed him of any witnesses that could testify on his behalf, trial counsel said that the Petitioner only informed him that the witnesses who picked him up in a van could have been discredited because they were users of crack cocaine and had bad memories. However, this information would not have helped to discredit the witnesses behind the house who had actually observed the shooting. Trial counsel confirmed that there were "numerous" witnesses to the "event." The Petitioner did not notify him of any potential alibi witnesses.

Further, trial counsel was not aware of any evidence the State proffered that he could have had suppressed. If there had been any evidence that would have potentially been subject to suppression, trial counsel would have requested a suppression hearing or a continuance.

Regarding the Petitioner's guilty plea petition, trial counsel testified that he went over it with the Petitioner and that the Petitioner understood it. Trial counsel informed the Petitioner that whether to accept the nineteen-year plea offer was his decision. The Petitioner "went back and forth" trying to decide whether to take the offer. Trial counsel told the Petitioner's mother that he was considering going to trial, and then trial counsel secured "special permission" for his mother to

speak to him. Trial counsel testified that his mother “was right” when she counseled him to accept the plea deal, and after his mother spoke with him, the Petitioner decided to accept the State’s offer.

The Petitioner never told trial counsel that he was taking any medications, and trial counsel never told the Petitioner to limit his answers to “yes” or “no” during the plea colloquy. Additionally, trial counsel explained that he did not refer to the members of the jury pool as “rednecks,” but rather he had called them “rejects” because several trials had “gone off” that morning, so most of the jurors left in the pool had already been passed over by other attorneys.

When asked on cross-examination about how many times he met with the Petitioner prior to the trial date, trial counsel stated that he had no records memorializing any meetings with the Petitioner, but he remembered meeting with the Petitioner on “a Sunday night” and estimated that they met on approximately three court dates prior to trial.

Trial counsel “believed” that an investigator met with the Petitioner and stated that it “might be correct” that the investigator met with him two times. Trial counsel testified that the investigator was present in court when the Petitioner’s case was scheduled for “settlement hearings” and that the investigator “[ran] down witnesses and things of that nature” and then submitted written reports to him. However, trial counsel did not have the reports with him on the day of the evidentiary hearing.¹ Trial counsel could not remember which of the State’s witnesses he or his investigator had spoken with in preparation for trial but maintained that he was ready for trial, although he had not prepared any questions for the State’s witnesses.

Subsequent to the post-conviction evidentiary hearing, the post-conviction court entered a written order denying relief. The order contains thorough findings of fact and conclusions of law. In its order, the post-conviction court accredited trial counsel’s testimony and specifically found that trial counsel had adequately consulted with the Petitioner prior to trial and that the Petitioner was not prejudiced by any alleged failure on the part of trial counsel to interview the State’s witnesses. Ultimately, the post-conviction court found that the Petitioner had “failed to demonstrate by clear and convincing evidence that trial counsel was ineffective or that he was prejudiced by counsel’s alleged deficient performance.”

Regarding the Petitioner’s assertion that his plea was involuntarily entered, the post-conviction court ruled as follows: “Based upon the Petitioner’s responses during the plea colloquy as well as the [post-conviction court’s] observation of the Petitioner’s demeanor, the [post-conviction court] finds that Petitioner was aware of the plea process and its ramifications and that he knowingly and voluntarily entered his guilty plea.”

The Petitioner now appeals from the post-conviction court’s order denying relief.

¹ The Petitioner’s post-conviction counsel requested permission to add the investigator’s reports as a late filed exhibit, but no exhibits were filed after the hearing.

Analysis

On appeal, the Petitioner argues that the post-conviction court erred by dismissing his petition for post-conviction relief because trial counsel's performance was in fact deficient and he was prejudiced thereby. Specifically, he asserts that trial counsel's performance was deficient because trial counsel "did not meet with [the Petitioner] at all," and because he never provided the Petitioner with "the benefit of his knowledge and expertise" Moreover, the Petitioner alleges that trial counsel should have met with the State's witnesses and better investigated the Petitioner's case so as to learn "about the various facts and circumstances relevant to the defense." Were it not for these deficiencies the Petitioner argues, "the results would have been different."

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weight or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction court's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for

counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

We conclude that the evidence presented at the post-conviction evidentiary hearing does not preponderate against the factual findings of the post-conviction court. As a result, the presumption that those findings are correct applies. See Fields, 40 S.W.3d at 458. The post-conviction court accredited trial counsel's testimony and implicitly found that the Petitioner was not credible, and we do not revisit the issue of credibility on appeal; we defer to the post-conviction court's ruling in that regard. Momon, 18 S.W.3d at 156. Accordingly, the Petitioner's assertion in his reply brief that his testimony at the post-conviction hearing was more credible than trial counsel's is fruitless. Trial counsel testified at the post-conviction hearing that he was prepared to go to trial, that no evidence proffered by the State was subject to suppression, and that he and his investigator adequately met with the Petitioner prior to the trial date in order to be apprised of the circumstances of the Petitioner's case. Accordingly, the Petitioner's claims on appeal that trial counsel failed to meet with him or prepare a defense are without merit.

The Petitioner has failed to prove by clear and convincing evidence that trial counsel's representation constituted deficient performance. Additionally, he has failed to show prejudice because he did not establish that, but for trial counsel's alleged errors, he would have proceeded to trial. In sum, the Petitioner has failed to demonstrate ineffective assistance of counsel.

In a related argument, the Petitioner also claims that his guilty plea was not voluntarily entered. He asserts that he only pled guilty because he did not believe trial counsel was ready to proceed to trial. However, the record, including this Court's review of the transcript from the

Petitioner's guilty plea submission hearing, fully supports the post-conviction court's finding that the Petitioner knowingly and voluntarily pled guilty. This issue is without merit.

Conclusion

Based upon the foregoing, we conclude that the post-conviction court did not err by dismissing the petition for post-conviction relief. Accordingly, the order of dismissal is affirmed.

DAVID H. WELLES, JUDGE